Eastern Essential Services, Inc. *and* Service Employees International Union, Local 32BJ. Case 22–CA–133001

May 2, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On July 13, 2015, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] to modify the recommended remedy,[3] and to adopt the recommended Order as modified and set forth in full below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Eastern Essentials Services, Inc., Fairfield, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(g) and reletter the subsequent paragraphs.

"(g) Compensate the employees referred to in paragraph 2(e) for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

There are no exceptions to the judge's dismissal of the allegation that the Respondent unlawfully told employee Rodrigo Puerta-Gil that it did not have a union.

[2] We adopt the judge's finding that the General Counsel met his initial burden to show that the Respondent's failure to hire the incumbent employees was discriminatorily motivated. In particular, we note that the Respondent's unlawful statements to two incumbent employees that they were not being hired because of their Union membership are substantial evidence of antiunion animus, and that the Respondent conducted its hiring at 300 Lighting Way in a manner intended to preclude the incumbent employees from being hired, contrary to a stated practice of hiring incumbent employees on request by a building's owner. We further note that three incumbent employees who went to the Respondent's office wearing Union shirts to request applications were told that that the Respondent was not giving out applications and turned away, but another person who was not wearing a Union shirt was told that same day to return in 1 or 2 weeks "when we're established and then you can apply.'

We also adopt the judge's finding that the Respondent failed to meet its rebuttal burden to show that it would not have hired the incumbent employees even in the absence of an unlawful motive. *Planned Building Services*, 347 NLRB 670, 673 (2006). The Respondent failed to show that its hiring at the three buildings involved in this case was consistent with its stated hiring policy and with an established practice of not hiring incumbent employees from a predecessor's work force. We also note that the Respondent never asserted to the Union or to the incumbent employees in any of the numerous exchanges in which the incumbents sought to keep their jobs, that it did not hire incumbents. On the contrary, as stated above, the two individuals with hiring authority at all three buildings unlawfully told incumbent employees on two occasions that the reason the Respondent was not hiring them was because of their Union membership. Furthermore, as also noted above, the Respondent did not hire any incumbent employees even when requested to do so by one of the building owners, contravening its own ostensible practice.

We find it unnecessary to rely on the judge's assessment of the inherent wisdom of the Respondent's stated hiring policy, with respect to either the General Counsel's initial showing or the Respondent's failure to carry its rebuttal burden.

Finally, in adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and by unilaterally changing the terms and conditions of employment of unit employees, we do not rely on *Mammoth Coal Co.*, 354 NLRB 687 (2009), affd. 358 NLRB 1643 (2012), appeal dismissed sub nom. 2014 WL 4627845 (D.C. Cir. 2014) (unpublished), cited by the judge.

[3] Although no party explicitly requested posting of the Board notice in both English and Spanish or excepted to the judge's failure to require a bilingual posting, the Board has the authority to consider remedial issues sua sponte. See, e.g., *J. Picini Flooring*, 356 NLRB 11, 12 fn. 5 (2010); *Ishikawa Gasket America*, 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004); *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996) ("It is also firmly established that remedial matters are traditionally within the Board's province and may be addressed by the Board in the absence of exceptions"). Here, given the undisputed facts that the overwhelming majority of the incumbent employees are Spanish-speaking, that some of them would not understand an English-only notice, and that the Respondent usually posts notices to employees in English and Spanish, we shall modify the judge's recommended Order to require the Respondent to post notices in both Spanish and English. *Amglo Kemlite Laboratories*, 360 NLRB No. 51, slip op. at 9 (2014) (notice posting in Polish and English where a "significant number" of employees spoke Polish); *Krystal Enterprises*, 345 NLRB 227, 227 fn. 3 (2005) (notice posting in Spanish and English "In light of the fact that many of the Respondent's employees are Spanish-speaking").

In accordance with our decision in *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall also modify the judge's recommended tax compensation and Social Security reporting remedy. We shall modify the judge's recommended Order and substitute a new notice to reflect these remedial changes and to conform to the Board's standard remedial language.

Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee."

2. Substitute the following for paragraph 2(h).

"(i) Within 14 days after service by the Region, post at its facility in Fairfield, New Jersey, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for 22, in English and Spanish, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 2014."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 2, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT inform you or applicants for employment that we are not hiring employees because they are with the Union.

WE WILL NOT refuse to hire you because you are members of and supported Service Employees International Union, Local 32BJ.

WE WILL NOT refuse to recognize and bargain in good faith with Service Employees International Union, Local 32BJ as your exclusive collective-bargaining representative in the following appropriate bargaining units:

All full-time, regular part time building service employees at the building located at 120 Mountainview Boulevard, Bernard Township, New Jersey, excluding guards and supervisors as defined in the Act.

All full-time, regular part time building service employees at the building located at One Meadowlands Plaza, East Rutherford, New Jersey, excluding guards and supervisors as defined in the Act.

All full-time, regular part time building service employees at the building located at 300 Lighting Way, Secaucus, New Jersey, excluding guards and supervisors as defined in the Act.

WE WILL NOT refuse to recognize and bargain with Service Employees International Union, Local 32BJ by unilaterally changing your terms and conditions of employment in the above appropriate bargaining units without prior notification to and bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify the Union in writing that we recognize the Union as the exclusive representative of our employees in the above units under Section 9(a) of the Act and that we will bargain with the Union concerning your terms and conditions of employment in the above-described appropriate bargaining units.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL recognize and, on request, bargain with the Union as your exclusive representative in the above-described appropriate bargaining units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL on request of the Union, rescind any departures from your terms and conditions of employment that existed immediately prior to our takeover of the operations of predecessors CRS Facility Services and Collins Building Services at the three locations set forth above, retroactively restoring your preexisting terms and conditions of employment, including wage rates and welfare and pension contributions, and other benefits, until we negotiate in good faith with the Union to agreement or to impasse.

WE WILL make you whole, with interest, for losses caused by our failure to apply the terms and conditions of employment that existed immediately prior to our takeover of the operations of predecessors CRS Facility Services and Collins Building Services at the three locations set forth above.

WE WILL within 14 days of the date of this Order, offer employment to the following former unit employees of CRS Facility Services and Collins Building Services, who would have been employed by us but for our unlawful discrimination against them, in their former positions or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their place:

120 Mountainview Boulevard, Bernard Township, NJ

Amanda Barrientos
Monepeque Castillo
Diana Cruz
Reyna Hernandez
Yvon Feo Hernandez
Leonardo Menijivar
Hector Mora

One Meadowlands Plaza, East Rutherford, NJ

Luis Airos
Maritza Alvarado
Wander Arias
Beatriz Bautista
Zuniba Carlos
Marina Castellanos
Rafael Cuevass
Luisa Flores
Rafaela Herrera
Ebelia Martinez
Maria Martinez
Julio Mercedes
Sara Perez
Iadira Persaud
Margarita Reberon
Hilda Tobar
Maria Valencia
Maida Veras

300 Lighting Way, Secaucus, NJ

Inez Fandino
Fanny Gramajo
Teresa Hernandez
Eleodoro Luciano
Luz Perez Orozco
Eteolo Sanchez
Maria de la Torre
Maria Victoria

WE WILL make you whole, with interest, for any loss of earnings and other benefits you may have suffered by reason of our unlawful refusal to hire you.

WE WILL compensate you for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

WE WILL within 14 days from the date of this Order, remove from our files any reference to our unlawful refusal to hire you, and, within 3 days thereafter, notify you in writing that this has been done and that the refusal to hire you will not be used against you in any way.

EASTERN ESSENTIAL SERVICES, INC.

The Board's decision can be found at www.nlrb.gov/case/22-CA-133001 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Saulo Santiago, Joanna Pagones, and *Susana Valussie Brentganen, Esqs.*, for the General Counsel.
Steven S. Glassman and *Matt Porio, Esqs. (Fox Rothschild, LLP),* of Roseland, New Jersey, for the Respondent.
Brent Garren, Esq., of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed on July 17, 2014, by Service Employees International Union, Local 32BJ (Union), a complaint was issued against Eastern Essential Services, Inc. (Respondent) on November 28, 2014.[1]

This case arises out of the replacement of cleaning contractors at three buildings where such services were performed by employees represented by the Union, and where the Union had collective-bargaining agreements with the companies which represented them.

The complaint, as amended, alleges that the Respondent, the alleged successor to the predecessor cleaning companies, refused to hire the predecessors' employees because of their union affiliation, and also unlawfully refused to bargain with the Union. The complaint also alleges that the Respondent impliedly threatened certain of the predecessors' employees that it would not operate as a union facility, and that they would not be hired because of their union membership.[2] The complaint alleges that, but for its refusals to hire its predecessors' employees, the Respondent would have employed, as a majority of its work force, individuals who were previously employed in the three units.

The Respondent's answer, as amended, denied the material allegations of the complaint, and on February 3–6, 2015, a hearing was held before me in Newark, New Jersey. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

I. FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a New Jersey corporation having its office and place of business at 122 Clinton Road, Fairfield, New Jersey, provides janitorial services for residential and commercial buildings in New Jersey. The Respondent annually purchases and receives at its Fairfield, New Jersey facility, goods and materials valued in excess of $50,000 directly from points outside New Jersey. The Respondent admits, and I find, that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

CRS Facility Services (CRS) held a cleaning contract for the building located at 120 Mountainview Boulevard, Bernard Township, New Jersey, and at 300 Lighting Way, Secaucus, New Jersey. Collins Building Services (Collins) held such a contract for the building at One Meadowlands Plaza, East Rutherford, New Jersey.

Both companies are signatories to the New Jersey Contractors Agreement, a master contract between the Union and about 60 cleaning contractors pursuant to which those companies recognized the Union. The contract is in effect from January 1, 2012 to December 31, 2015. Each contract recognized the Union in a unit which consisted of "all full-time, regular part time building service employees at the respective building, excluding guards and supervisors as defined in the Act."

In mid-2014, CRS and Collins lost the contracts to clean the three buildings. The Respondent was awarded those contracts. The Respondent has been operating for 12 years, performing commercial janitorial services for property owners and management companies.

The approximately 88 buildings it cleans are in New Jersey. The Respondent's hierarchy consists of Thomas Quinn, its owner and president, David Pettinger, Regional Director and vice president of janitorial operations, and two operations managers, William Castro and Arnold Perilla, who are admitted statutory supervisors.

Quinn testified that he usually receives about 30 days' notice that his company has been awarded the cleaning contract for a building. He then meets with Pettinger and they decide how many employees are needed to perform the contract. Quinn then discusses the contract's specifications with managers Castro and Perilla. Those managers then locate the employees for hire.

The Respondent, which is nonunion at all the locations it cleans, has a policy of never hiring the current employees working in the building which it takes over. It is the Respondent's policy to bring in all new employees when it begins a new account unless it is specifically instructed by its client to retain an employee or employees. The Respondent never placed a help-wanted advertisement for cleaners. Instead, it uses an "internal reference system" whereby its operations managers, who are responsible for locating new employees, use their network of people who know of family and friends seeking cleaning work.

During its 12-year history, the Respondent has undertaken cleaning services at four buildings where employees were rep-

[1] Prior to the opening of the hearing, the Respondent filed a Motion for Summary Judgment with the Board. On February 6, 2015, the Board denied the Motion.

[2] This amendment was made at the opening of the hearing. GC Exh. 1(j).

resented by a union. Three of those are the cases involved here. The other building was taken over in 2007. At that location, the Respondent, as here, did not hire any of the incumbent, union-represented workers.

Quinn stated that he learned that the three buildings' employees were represented by a union after he placed bids for the work but prior to the time the Respondent began work there.

B. The Three Locations

1. 120 Mountainview Boulevard

In mid-April, 2014, the Respondent was awarded the contract to clean 120 Mountainview Boulevard which comprises about 140,000 square feet. The Respondent determined that it would need seven employees and one supervisor to perform this contract.

Castro was responsible for locating employees for this contract. However, he delegated this job to Mario, a lead employee. Castro told Mario the date the Respondent would begin cleaning the building, the pay rate, the schedule, and that seven workers were needed. Mario did not testify, and there was no evidence that Mario was told about the Respondent's internal reference policy.

On May 12, employee Yvon Hernandez arrived at the building and met with her coworkers and Union agent Gladys Sanchez. They were informed by former Respondent CRS that a new cleaning company would be starting shortly. The workers signed a petition which stated that they currently worked at the building and wanted to apply for continued employment with the Respondent at the premises.

On the same day, Kevin Brown, the Union's New Jersey district director, sent a letter by overnight mail, email and fax to Quinn, advising him that the Union represents the building's cleaners, who wish to work for the Respondent. The letter stated that it served as a formal application for work, and asked Quinn to contact Brown to coordinate the application process. Quinn conceded that his office received the message, but stated that it was not delivered to him. He could not give a reason as to why he did not read it or why it was not given to him.

On May 15, Union Agent Sanchez entered the building. The security guard told her "you are from the union." Sanchez denied being with the Union and left. Later, she met the former employees in the parking lot. The guard met them and said "I knew you were from the union" and then told them to leave. Sanchez explained that she merely wanted to give the petition to the new company. The guard told her that they had no right being in the building, the building manager did not want them there, and demanded that they leave the private property. Yvon Hernandez stated that she heard the guard say that the company did not want anyone "with the union," adding that they were bringing their own workers who earned $8 per hour. The guard threatened to call the police and the group walked to their cars.

While the group was in the parking lot, the Respondent's van arrived. Sanchez and the former workers attempted to approach the van. The guard demanded that they leave. Sanchez insisted on giving the new company the petition. The guard replied that "the building manager does not want the union here and the company is not going to accept these workers."

Sanchez, who did not deliver the petition, did not know the name of the guard's Respondent.

Operations Manager Castro testified that he arrived with the company van that evening but did not see any union agents and did not speak to the guard concerning whether the union represented the former employees.

Yvon Hernandez stated that 3 weeks later she visited the Respondent's office with coworker Reyna Hernandez. They were given applications which they completed, writing on the application that they worked at CRS. They immediately returned the applications to the office. The woman who accepted the applications asked them for their drivers' licenses and social security cards. The man in the office who reviewed the applications told his female colleague that they were "employees of CRS." They were then told that they would be called when the Respondent had positions for them.

The applications of Yvon Hernandez and Reyna Hernandez, both dated July 25, and the application of displaced employee Hector Mora, dated July 16, produced by the Respondent, were received in evidence. None of them was called for work by the Respondent.

2. One Meadowlands Plaza

Quinn was advised in late May that the Respondent would be the cleaning contractor at One Meadowlands Plaza, which comprises about 400,000 square feet. It needed about 19 employees to perform the contract and Manager Castro began looking for employees at that time. Castro noted that Perilla bore the main responsibility for this building, but, nevertheless, Castro received referrals from the Respondent's employees at nearby buildings.

Perilla stated that he located 15 to 20 workers. He spoke with some of them by phone, and had some of them complete applications.

Rodrigo Puerta-Gil was told by a friend who worked for the Respondent that Perilla sought employees for two of his buildings. In early June, Puerta-Gil asked Perilla for a job. Perilla asked if he had experience as a cleaner, and was told that he did such work for 13 years. Perilla told him that the salary was $8.50 per hour. Puerta-Gil asked why the wage rate was so low. Perilla replied that "the company didn't have a union and they were not able to pay more."

Perilla denied saying anything to Puerta-Gil about a union. Perilla did not recall if he reviewed Puerta-Gil's application. When Puerto-Gil told him he had experience, Perilla did not ask for the names of the companies he worked for and did not call his references, stating that the Respondent's office personnel performed that task.

Perilla and Puerta-Gil met the next day and Perilla gave him an application which he completed that day or the next. It is dated June 21. Perilla asked Puerta-Gil if he knew more people who wanted to work. Puerta-Gil said he had two friends who wanted to work. About 1 week later, Perilla called Puerta-Gil and told him to report to work the next day, June 27, and that he should bring his two friends.

Puerta-Gil began work at the building with his two acquaint-

ances, Beatriz and Quenida.[3] He stated that Rodriguez spoke by phone with Perilla and completed an application before beginning work, but Henriquez did neither. Puerta-Gil stated that neither he nor Rodriguez or Henriquez were given any training before beginning work because they all had experience as cleaners.

Perilla stated that he trusted the referral from the woman who recommended Puerta-Gil because he knew her for 12 years, and that it was important to him that he knew the person who made the recommendation. However, Perilla testified that he "would not take the word of somebody [he] had just met about a new employee," but, nevertheless, Perilla hired Beatriz and Quenida upon the recommendation of Puerta-Gil, a person he had just met.

The Respondent began work at One Meadowlands Plaza on June 27. On that day, Quinn received a letter from Union Official Brown asking him to provide applications to the former employees, and on the same day, Union Agent Luz Garate visited the building. Also present were Union Agents Martha Motato and Mooney, the former cleaning workers, Respondent's official Pettinger and supervisor Luz Guzman.

Garate testified that she told the Respondent's agents that the employees who had been working in the building for years wanted to apply for jobs with the new company. Garate quoted Pettinger as saying "I don't have anything to do with that. We have workers. We don't have jobs for you guys." Garate persisted, but Pettinger told her that he had no jobs for them, and advised them that they had to leave because they were on private property. He also told Garate "I know who you are" and asked her to have "Kevin" call him. "Kevin" is an apparent reference to Kevin Brown, the Union's vice president and New Jersey state director.

Quinn stated that he was at the building in the morning of June 27 where he met with his brother, Pettinger, and Castro. They were busy moving equipment and supplies up and down the freight elevator. He conceded that they were not present at the same time in the same place. He did not see the former day porter that day.

On June 27, day porter Beatriz Bautista reported to work and was told by Danny, the building engineer, that Collins was no longer the cleaning contractor. He introduced Bautista as the former day porter to the new owner's representatives who were there that day. She was told by the Respondent's English speaking agent, apparently Quinn or Pettinger, to speak to his Spanish speaking colleague.[4] Pettinger denied seeing Bautista that morning.

Bautista testified that she greeted Castro, whereupon Castro immediately said, "the reason we are not accepting you is because you are with the union." She replied "it's fine. What are we going to do? Thank you." Castro replied that he was sorry.[5]

Castro testified that he was at the building in the morning with Quinn and his brother. He did not recall seeing the Respondent's day porter. Castro did not deny the conversation with Bautista, but conceded that on June 27 his "head was a mess and a lot of things I don't remember on that day, a lot of things at the same time on that day."

In the evening of June 27, former employee Maritza Alvarado and all of her co-workers met with Union agents Garate, Motato, and Monique. Alvarado stood in a group of employees about 15 feet from where Garate spoke to a representative of the Respondent, who, as I find below, was Perilla. She stated that they spoke in English, and although she was not able to hear what Perilla said to Garate, she quoted him as saying that the reason they were no longer working there was "because we had the union or because they wanted new people and he didn't want us." I cannot credit Alvarado's uncorroborated testimony in this regard. She could not have faithfully quoted Perilla's comments when she could not hear what he said.

Puerta-Gil saw Union Agent Martha Motato and the former employees at One Meadowlands Plaza that night, and they complained to Perilla that they were unjustly dismissed. He also witnessed an argument between Perilla and Garate. Although Puerta-Gil stated that he did not hear what Perilla said to Motato, he quoted Perilla as saying that the workers "are not supposed to be" in the building. He saw Perilla take the applications from the workers who told him that "they wanted to work."

Puerta-Gil stated that he and new employees Rodriguez and Henriquez worked 5½ hours that night, 1½ hours more than scheduled because they were short of help. At the end of the evening, Castro asked him if he knew more employees who wanted to work. Puerta-Gil replied that he did, and the next workday, June 30, he brought two new employees, Juan Carlos Sossa and Ruben (last name unknown). Rodriguez and Henriquez worked on June 30.

The following week, Alvarado, Beatriz Bautista, Sara Martinez and her daughter Jessica Collado, went to the Respondent's office. Alvarado, Bautista, and Martinez, wearing shirts which identified them as being affiliated with the Union, attempted to enter. They were not permitted to enter but were asked what they wanted, apparently through the closed door. They replied that they wanted applications. They were told that the company was not giving out applications. They left and told Collado to ask for an application. It was their belief that since Collado was not a former employee at the building, she might receive an application.

After 10 or 15 minutes, Collado, who had not worked at any of the three buildings at issue here, entered the office without wearing a union shirt, and told the receptionist that she heard that the company was looking for workers. She asked for an application and was told to return in 1 or 2 weeks "when we're established and then you can apply."

Two weeks later, Collado returned to the office. She told the receptionist that she was asked to return to apply for work.

[3] The Respondent's payroll records support Puerta-Gil's testimony concerning the start date of Beatriz and Quenida. They establish that Beatriz, identified as Beatriz Rodriguez, and Quenida, identified as Quenida Henriquez, were first paid during the payroll period June 23 to July 6, 2014.

[4] Castro conceded that he was the only Spanish-speaking representative of the Respondent present that morning. Accordingly, I find that Bautista spoke to Castro at that time.

[5] Bautista's pretrial affidavit did not state that Castro said that he was sorry.

Collado was not given an application and was told that the company was not hiring.

Alvarado and Bautista testified that about 3 weeks after their initial visit, they returned to the Respondent's office with the same group of coworkers. They were given applications which they filled out and returned to the office immediately. Thereafter, they were not called for employment.

The Respondent produced applications from 14 former employees. Three were dated July 7, seven were dated July 22, including the one from Bautista, and four were dated July 23, including the one from Alvarado.

On July 1, Puerta-Gil, Juan Carlos Sossa, and Ruben arrived late to work. They were told that they were not needed at One Meadowlands Plaza because there was enough staff, but that they would be called to work at another building, which later turned out to be 300 Lighting Way.

Puerta-Gil testified that following his tenure at 300 Lighting Way, in about August 2014, he was hired at One Meadowlands Plaza. He stated that of the people he brought initially, Rodriguez, Henriquez, Juan Carlos Sossa, and Ruben, only Rodriguez remained employed there. He noted that Juan Carlos Sossa and Ruben worked at 300 Lighting Way at that time. However, he also testified that other employees who started with him on June 27 were still present in September.

Castro stated that One Meadowlands Plaza had a turnover of 45 percent of its cleaners who began work on June 27. In addition, the Respondent assumed additional work at that building after its contract began. As a result, the Respondent had to hire more workers. They were obtained based on referrals from the workers already employed at that building.

3. 300 Lighting Way

On about June 18, Quinn was advised that the Respondent would be cleaning 300 Lighting Way which has about 300,000 square feet of space. He began the hiring process immediately. On about June 22, the Respondent was advised that it was awarded the bid. Perilla was confident that he would locate the eight cleaners needed since he had many referrals and acquaintances who could supply workers.

The Respondent was scheduled to begin its cleaning operation on July 1. However, due to a delay in the closing of the purchase by the owner, the Respondent started work on July 8.

In early July, the Union was informed that the Respondent would be cleaning 300 Lighting Way. On July 1, the Union sent a letter to Quinn, which he received, advising him that it represents the workers at the building, and asking him for applications for employment. A list of the eight former employees was included in the letter.

On July 16, the Union sent a letter to Quinn, which he received, stating that the Respondent unlawfully refused to hire the Union employees at the three locations. The employees' names were attached to the letter. The letter asked that the Respondent hire the former employees, recognize and bargain with the union, and restore to the employees their former terms and conditions. Quinn did not respond to this or any other correspondence sent by the Union regarding the three buildings.

Maurice Adis, a partner in Rugby Realty, the owner of the building, asked Quinn to "offer jobs to the existing employees" and post a notice at the building explaining that the Respondent would be cleaning the facility and that "they are all welcome to apply for positions."

Quinn wrote a notice and, on July 1 or 2, posted it on the first floor men's bathroom door. He was advised to post it there by the building's engineer who mentioned that that was the best place for it since the bathroom contained a janitorial closet where all the cleaning workers signed in.

The notice, which was in English, stated as follows:

> Please be advised that on July 3, Eastern Essential Services will be taking over the cleaning for 300 Lighting Way. We are currently accepting applications for cleaners. You are welcome to apply in our offices.

The notice contained the Respondent's logo and business address. Quinn, who wrote and typed the notice in his office, testified that no Spanish translation of the notice was provided. Although, in the past, notices to employees were written in Spanish, no Spanish-literate person was available in his office at that time to write the notice in that language. Quinn conceded that the overwhelming majority of the Respondent's cleaning employees are Spanish-speaking.

Manager Perilla testified that notices to employees are usually posted in English and Spanish, noting that 98 percent of his workers are Spanish speaking. He added that if he posted a notice in English he did not believe that the cleaners would understand it, and that he has never posted notices for employees in Spanish only in his buildings.

Former employee Teresa Hernandez and day porter Maria de la Torre, testified that they did not see the notice or any other written message concerning applying for a job. Hernandez was not told by her former supervisor about the notice, and none of her coworkers told her that they saw such a notice. She added that she neither speaks nor reads English.

Adis, the prior building owner, asked Quinn on two separate occasions if anyone applied in response to the notice he had posted. Quinn told him "no." During the second call, which occurred in the evening of July 3, Adis told him to have an employee visit the building and offer positions to the workers. Quinn told Perilla to do so, and Perilla visited the building that evening.

On July 3, a meeting was held with eight former cleaning employees and Perilla who introduced himself as the new supervisor.[6] Teresa Hernandez stated that Perilla asked the workers how many years they had worked in the building and their rate of pay. They said that they were members of the Union and earned $12.80 per hour but were due for a raise to $13.20 the following week. He told them that the Respondent paid $8.50 per hour and offered "no benefits of any kind, no vacation, no sick days, nothing."

Hernandez recalled the workers as being "worried and scared." Shop steward Fanny Gramajo phoned union agent

[6] Brown and Garate testified about what they were told by employees concerning their meeting with Perilla. Brown was not present at the meeting and Garate was not present at part of that meeting. Accordingly, their testimony as to what was said when they were not present is hearsay. I do not rely on such testimony.

Garate who advised that the employees "accept the applications." The workers then told Perilla that "we do accept the applications." Employee Elodro Luciano testified similarly. He stated that when Perilla announced the new wage rate, they were "surprised" because they earned nearly $5 more per hour. Nevertheless, they needed the jobs. Luciano testified that he and his co-workers told Perilla that "we accept the job."

Perilla retrieved three applications from his car and gave one to Luz Orozco. Additional copies were made and distributed to the workers. Orozco completed the application and gave it to Perilla who told her that he needed her social security card and immigration status card.[7] Other employees said that they did not have the documentation needed to complete the applications. Perilla told them that he would pick up the applications at their homes that Saturday or Sunday. Orozco, Luciano, and Hernandez stated that Perilla prepared a list and the workers wrote their names, addresses, and phone numbers on it. Perilla gave the workers his phone number and business card and told them to call him so that he would know where to pick up their applications.

Orozco stated that Perilla told the assembled workers that they should return to the building the following Tuesday, July 8, to begin work. Luciano, however, stated that Perilla told them that the workers would "possibly" start on Tuesday. The Respondent argues that Perilla could not have told the workers that they would begin work on July 8 because it did not know until July 7 that, due to a delay in the building's closing, cleaning would not begin until July 8. In fact, the Respondent was to begin its contract on July 7, but was told on that morning that the closing would occur the following day.

I cannot find that the above undermines the credibility of Orozco and Luciano. The original closing was scheduled for July 1. Perilla conceded that on July 3 he told the displaced workers that cleaning would begin on July 7, the rescheduled date for the closing and the commencement of the cleaning contract. Accordingly, Luciano's statement that Perilla told the workers that they would "possibly" begin on July 8 was truthful. The fact that all the former workers returned to the building on July 8, at which time Garate quoted employees as asking "are we going to start work now?" Hernandez quoted Garate as telling Perilla that they were present because "he had promised us to give us work, "supports a finding that he told them that they would possibly begin work that day.

During the weekend of July 4, Perilla did not pick up the applications of the former workers, and did not answer or return the calls made to him by the displaced employees.

Perilla testified that Quinn asked him to offer jobs to the predecessor's workers. He addressed a meeting of those employees on July 3 where he told them that the new company would begin work on July 7 and offered to employ them at $8.50 per hour with no benefits. He recalled the employees replying that they would have to speak to their current employer and the Union because they were earning more money and had been employed at the building for many years. Perilla responded "regardless of that" he had applications for them if they wanted. Some said "yes, we are going to fill them out."

Perilla stated that he distributed applications and his business card to the workers, advising them to return them to the office. Perilla then called Quinn, telling him that the workers had not accepted his offer of jobs because the pay offered was too low, adding "but anyway I gave them the applications." In addition, certain workers said that they did not want an application.

Perilla testified that he did not agree to pick up the applications at anyone's house, noting that he did not have their addresses, nor did he receive a list of the employees' contact information, adding that he told them to bring the applications to the office. I cannot credit his testimony which contradicts the consistent testimony of employee witnesses Hernandez, Luciano, and Orozco that he prepared a list on which the employees wrote their contact information.

Perilla further stated that he did not recall receiving phone calls from those employees during the weekend of July 4. However, he conceded that he received many phone calls that weekend from telephone numbers that he did not recognize and, accordingly, did not answer or return those calls.

Since the applications were not picked up by Perilla, Garate told the employees to come to 300 Lighting Way on July 8, at which time they would submit the applications. She stated that she and seven former employees were at the building at about 6:25 p.m. and saw Perilla arrive with a number of new employees.

Garate met Perilla in the lobby. He asked why they were there and she said that the workers were delivering their applications for employment. Perilla responded, "Ok, ok, we don't have a job. I have people here working." Perilla refused to accept the applications at that time.

The workers insisted on returning to work, holding their applications. Perilla replied, "I don't have anything to do with that. I have workers here. I have work to do. We are not union." Garate said that she understood, but the employees wanted to continue working in the building.

Certain employees reminded Perilla that he said he would pick up the applications but did not. Perilla then took the applications from the employees, according to Garate, "grabbing them," and told them that they had to leave because they were on private property. Garate asked whether the former employees "are going to work or not." Perilla replied, "No. I have workers here. I will call you."

Luciano testified that the workers attempted to give Perilla the applications but, at first, he refused to accept them. Later, Perilla asked them to place the applications on a table in the hallway, and, according to Luciano, Perilla he took them and waved them, according to Luciano, "like it was nothing."

I credit Hernandez' testimony that Perilla accepted the applications on or about July 8. Her application was produced by the Respondent. It was dated July 3 which corresponds to the date that she testified she was given an application at the building by Perilla, and that he accepted them when the workers returned to the building on July 8. Her testimony is further believable because, as she testified, she went to the Respondent's office on July 10 and was told there that Perilla had her application.

Further support for the finding that Perilla received the applications that evening is Puerta-Gil's testimony that when he

[7] Orozco stated that she was the only employee who completed her application and returned it to Perilla at that time.

began work at the building that night, he heard Garate and the former employees tell Perilla that they wanted to return to work. Later that evening, Perilla showed Puerta-Gil the applications they had given to him earlier that night.

Perilla testified that when he arrived at the building with the new workers that day, he was met by Garate and the former employees. Garate asked him why he did not offer jobs to the former workers. Perilla replied that he did not have to speak with her and that he knew nothing. The police arrived at the building shortly thereafter.

Perilla denied being given any applications by the former workers at that time. Based on the above consistent testimony by the General Counsel's witnesses, I do not accept Perilla's testimony that he did not receive any applications at 300 Lighting Way.

The Respondent seeks to support Perilla's denial by arguing that the employees' testimony concerning the receipt of the applications renders their versions incredible. Although there was testimony that Perilla "took the applications" from them, and other testimony that they placed the applications on the table and Perilla then took them, the difference is insignificant. Whether Perilla took them from their hands or took them from the table is immaterial. How Perilla obtained the applications is of no moment. The fact remains that Perilla took the applications—whether they were handed to him or whether he retrieved them from the table. The minor variation in testimony as to how he received them is of little consequence. Puerta-Gil's testimony that Perilla showed him the applications that evening further supports this finding.

After this confrontation concerning the applications, Garate and the employees left the building. As they stood in the parking lot, police officers arrived and told them that they were on private property. Garate explained that they formerly worked in the building. The police entered the building and then returned, telling Garate that Perilla agreed to take the applications to his office and that they should go to the Respondent's office the following day.

Teresa Hernandez stated that on July 8, the police advised that the workers that they should visit the Respondent's office to make sure that it received their applications. On July 10, she and other former employees entered the office and announced that they were present to make sure that Perilla brought their applications to the office. The secretary said that she did not know anything about the applications and that she would ask him. She left and then told the group that Perilla had the applications. They asked to speak to Perilla, but she said that he was very busy, but that they would be called. Hernandez did not receive a call from the Respondent.

Maria de la Torre, the CRS day porter, testified that she reported to work, as usual, in the morning of July 7. Perilla arrived with a woman who de la Torre believed would be the new day porter. Perilla told de la Torre that he was the supervisor for the new cleaning company and asked her current wage. She replied that she earned $12.80 per hour and that "we also had a union." Perilla replied that the owner "didn't want people in the union" and that he was "offering her $10.00 per hour."[8] She answered that instead of being without work she "would accept that," adding that since she does not drive and lives near the building, working there would be convenient. She quoted Perilla as saying "ok, I will give you an application." However, Perilla did not, at that time, supply de la Torre with an application.

Perilla testified that he offered de la Torre a job. According to Perilla, she asked for the wage rate and Perilla replied $12 per hour. He said that de la Torre rejected the offer, saying that she earned $17 or $18 per hour, and that she had been employed at the building for many years. Perilla added that he told Quinn, who was at the building at that time, that she had declined his offer, but that she had to speak to her current company or the Union.

Quinn testified that when he saw the former day porter, presumably de la Torre, he asked Perilla if he had spoken to her about a position. Perilla said "no," and Quinn asked him to speak with her at that time. They then conversed briefly and Perilla told Quinn that he offered her a job but she declined.

De la Torre stated that the following day, July 8, Perilla brought a different woman to the building and asked de la Torre to show her how to perform the job that she was doing.[9] De la Torre refused. She stated that the following day, July 9, she saw Perilla in the parking lot where he told her that "since we're Colombian, I'm going to be honest with you. The new owner does not want the union. Are you willing to take $10 per hour without benefits?"

It must be noted that de la Torre's pretrial affidavit states that the "new building owner does not want the union." However, as noted above, she testified at the hearing that Perilla told her that the "owner does not want the union." The Respondent argues that her affidavit recitation should be credited over her hearing testimony, leading to the conclusion that Perilla told her that the building owner, and not the Respondent, did not want the Union. I reject the Respondent's argument. I do not believe that Perilla would have taken de la Torre into his confidence by telling her that he was being honest with her about the building owner's union animus. Rather, it seems more likely that he would share this confidential information with a fellow-native about his own company, the Respondent.Indeed, the facts of this case support a finding that the Respondent did not want its employees to be represented by the Union.

De la Torre said she would accept the offer. Perilla told her to wait while he helped the new employees start their work. She waited in the parking lot and when Perilla returned he gave her his business card and an application, and told her to fill it out and return it to the Respondent's office. Perilla testified that Colombia is his native country, but denied having this conversation with de la Torre.

---

[8] De La Torre's pretrial affidavit, which she gave on August 6, 2014, does not mention the word "union." The affidavit describes that conversation as Perilla saying that she could continue working at the building but the new owner offered only $10 per hour and no benefits. He asked de la Torre if that was acceptable and she said, "yes."

[9] At hearing, Perilla testified that the woman he brought on July 7, subsequently had to return to Colombia due to an emergency.

De la Torre filled out the application and gave it to a woman at the Respondent's office. Since she did not receive a call offering her employment, she returned to the office 1 week later and completed another application.[10] Thereafter, she was not called by the Respondent.

Employee Rodrigo Puerta-Gil stated that about 1 or 2 weeks after being laid off from One Meadowlands Plaza, Perilla called him and said that he had a job for him at 300 Lighting Way, and, in addition, he needed an English-speaking employee to be the supervisor at 300 Lighting Way. Puerta-Gil recommended his acquaintance, Ruben Galvez.[11]

The day after Puerta-Gil began work in July at 300 Lighting Way, he brought Juan Carlos Sossa's mother, Elizabeth, and sister, Lizbelle, to the job. They worked with Puerta-Gil for 2 months at 300 Lighting Way. Perilla had not given him applications for the two women. Puerta-Gil stated that he, Juan Carlos Sossa, employee Ruben, Supervisor Ruben Galvez, and Elizabeth and Lizbelle Sossa filed applications "many days" after they began work. Moreover, Puerta-Gil stated that none of those people were interviewed before they began work.

Puerta-Gil worked for 2 months at 300 Lighting Way but was then discharged. He told Castro that if he was not reinstated, he would sue the Respondent. About one week later, he was hired to work at One Meadowlands Plaza.

Castro testified that there has been a turnover of 20 to 25 percent of the staff at 300 Lighting Way since the Respondent began operations there.

The Respondent's records show that it received applications from only three of the incumbent employees: Fanny Gramajo, dated August 15, Teresa Hernandez, dated July 3, and Maria Victoria, dated July 28.

Since the Respondent began work at all three buildings, it has hired replacement employees for workers who quit or were terminated. Replacements have come from new hires, transfers from the Respondent's other buildings, and from a previously discharged employee, Rodrigo Puerta-Gil. However, no replacements came from any of the displaced, former employees represented by the Union.

C. The Respondent's Defense

The Respondent has an "internal reference system" of hiring, pursuant to which it hires only employees obtained by its operations managers. In its 12-year history, it has never hired incumbent employees of buildings that it contracts to clean unless it is told by the predecessor Respondent to retain an employee or employees. The Respondent argues, therefore, that it could not have violated the Act because of its lawful policy of not hiring incumbent workers.

Quinn stated that the Respondent "always" conducts interviews of prospective employees. Although he does not interview the candidates, Castro, Perilla, and occasionally, Pettinger, conduct the interviews. However, Perilla stated that he located all the employees the Respondent needed for One Meadowlands Plaza but only spoke to "some" of the candidates. Castro could not have conducted interviews of other employees at that building because he testified that he did not secure any employees for that building during the start-up. Only Perilla did so.

Perilla stated that candidates always submit their applications to the Respondent's office, and that he never received applications at the buildings he is in charge of. In contrast, Castro stated that applicants bring their applications to the office and to the building that they are assigned to.

Quinn stated that he receives applications from prospective employees before they are hired or on the date that they start work. He stated that the Respondent "does not turn people away," it accepts applications from "walk-ins." The Respondent has "boxes" of applications which are kept in a pile for "a long time," possibly 5 years. He did not know what the office does with that pile of applications. Quinn stated that the Respondent may hire someone from those applications, which would not violate its internal referral system.

Jeffrey Edelstein, a consultant in the field of janitorial services, has worked in the cleaning industry for more than 45 years. It was Edelstein's opinion that a cleaning contractor's best business practice is to hire its predecessor's employees. By doing so, the new company "hits the ground running" with a staff that has experience in the building and knows its tenants' preferences. Further, it is presumed that the current staff is composed of honest workers who are well-known to the tenants and, because of their tenure in the building, are trustworthy and hardworking. In addition, the replacement of employees is expected to be costly due to the retraining of employees to fill the positions, interviewing, screening the prospective workers, and performing background checks. He further noted that New Jersey is a state where public transportation is limited and, in most buildings, the employees travel by private means, including car pools arranged with their coworkers.

Edelstein stated that he had never been asked to eliminate the entire work force of a current contractor for any reason. He stated that "it makes no sense" and there is no rational reason or sound business practice for a Respondent to refuse to hire any of the predecessor's employees. He doubts that a company which refused to hire the entire former work force would be profitable.

Nevertheless, he stated that he knew of contractors who do not hire any of the predecessor's employees but hire new workers through internal referrals with no help-wanted advertisements. He did not know if those Respondents hired an entire work force through internal hiring procedures.

Analysis and Discussion

I. THE ALLEGED THREATS

The complaint alleges that on about June 26, 2014, the Respondent impliedly threatened employees that it would not operate as a union facility.

I credit Puerta-Gil's testimony that Perilla told him during his interview that the Respondent did not have a union and was not able to pay a higher wage. This was in answer to Puerta-Gil's question as to why the wages were so low. Puerta-Gil's

[10] De la Torre's affidavit does not mention her second visit to the Respondent's office.

[11] The Respondent's payroll records support Puerta-Gil's testimony concerning the start date of Ruben Galvez. They establish that he was first paid during the payroll period July 7 to 20, 2014.

testimony is believable. An applicant for employment would undoubtedly be expected to ask his wage rate and inquire as to why it was lower than he expected to receive. Similarly, Perilla's response is also believable, attributing the low wage to the fact that the employees were not represented by a union.

The Respondent attacks Puerta-Gil's credibility on the grounds that he is a neighbor and friend of Union Agent Martha Motato. There is no basis for believing that based on his acquaintance with Motato he would testify falsely. Similarly, the fact that he was discharged by the Respondent and threatened to sue it is also not a basis to discredit his testimony. Following his discharge, Puerta-Gil was reinstated by the Respondent and then retired from its employ.

In agreement with the Respondent, I find that Perilla's statement to Puerta-Gil that the company did not have a union was lawful. The statement was not accompanied at that time by any threats, interrogations, or other unlawful coercion. "In light of the respondent's preexisting operation as a nonunion company [Perilla's] statement constituted a truthful statement of an objective fact." *P.S. Elliot Services,* 300 NLRB 1161, 1162 (1990). Moreover, the statement was made in response to Puerta-Gil's question as to why the wage rate was so low. Perilla answered the question truthfully.

Moreover, the statement was made at a time when the Respondent had no obligation to recognize and bargain with the Union. Puerta-Gil stated that the conversation took place in early June which was shortly after the Respondent was awarded the contract to clean One Meadowlands Plaza. Further, his application is dated June 21. The alleged threat was made at least one week before June 27, the date on which the complaint alleges that the Respondent had an obligation to recognize and bargain with the Union. Cf. *Windsor Convalescent Center,* 351 NLRB 975, 987 (2007).

Perilla factually stated that the Respondent did not have a union. Perilla's statement lacks the coercion and implied threat present in statements made in the cases cited by the General Counsel. *Kessel Food Markets*, 287 NLRB 426, 429 (1987) ("the company will be nonunion"); *Advanced Stretchforming International*, 323 NLRB 529, 530 (1997) ("there will be no union"); *W & M Properties*, 348 NLRB 162, 163 (2006) ("a job with the respondent would be a nonunion job because the owners did not want the union.")

Thus, Perilla did not impliedly threaten its predecessors' employees, as alleged in the amended complaint, that the Respondent "would not operate as a union facility." He did not state how the Respondent intended to operate in the future. Perilla's factual comment was that it was not a union facility.

I accordingly will dismiss this allegation of the complaint.

The complaint also alleges that on about June 27 and July 9, the Respondent impliedly threatened employees with not being hired because of their union sympathies, activities and membership.

I credit the testimony of former day porter Beatriz Bautista that she was told on June 27, the day the Respondent began work at One Meadowlands Plaza, by manager Castro, upon being introduced to her, that she was not being hired because she was "with the union." The Respondent contends that her testimony is not credible because, according to Bautista, there were no preliminaries exchanged between the two, and that her response, that she thanked him and said that it was "fine," was an unlikely reply to someone who has just been refused hire.

On June 27, the first day of work at that building, Castro admittedly was very busy doing many things at the same time and did not recall the evening's events clearly. Nor did he deny the conversation with Bautista. He obviously did not have time for a pleasant conversation with her. Bautista's response, being the only former employee on the premises at the time, was understandable. She was told she was being refused hire. Other Respondent's officials were nearby. She understandably may not have believed that a protest or a more forceful response would be successful. I do not believe that this undermines her credibility.

I also credit the testimony of the 300 Lighting Way former day porter Maria de la Torre who, when asked by Perilla for her current wage rate, told him, adding that she was represented by a union. She credibly testified that Perilla told her that the owner did not want people in the union. I further credit her testimony that one or two days later, Perilla told her that he wanted to be honest with her since they were both natives of Colombia, and that the new owner "does not want the Union." She then accepted his wage offer of $10 per hour and was given an application which she submitted to the Respondent's office.

I find that de la Torre's testimony is believable. Perilla apparently felt an obligation to confide in a fellow native Colombian that she would not be hired because the Respondent did not want the Union. The Respondent argues that, if Perilla made that statement he would not have given her an application, knowing that she was a union member. The Respondent's records did not contain de la Torre's application. However, other employees at that building had been given applications pursuant to the Respondent's ostensible effort to comply with the building owner's request that he offer them jobs.

The Respondent further asserts that her testimony is not believable because, according to de la Torre, Perilla offered her a job on the same day that he brought a new day porter to the building. The Respondent argues that Perilla would have no reason to undertake two contradictory actions. One explanation may be that Perilla wanted to appear to help a fellow countryperson while at the same time knowing that the Respondent would reject her application and not offer her a job.

Assuming, however, that her application was received, the Respondent, in reviewing her application, was undoubtedly aware that she was a former employee of 300 Lighting Way. The Respondent disregarded her application, as it failed to consider other applications submitted by former employees of that building and the other two buildings.

I find, as alleged, that the Respondent violated Section 8(a)(1) of the Act in making these statements to Bautista and de la Torre. *K-Air Corp.*, 360 NLRB No. 30, slip op. at 1 (2014) (the Respondent told an employee that it "had no interest in having" or "did not want" union members as employees which constituted a threat that it would not knowingly employ union members); *J & R Roofing Co.*, 350 NLRB 694, 694 (2007) (telling applicants that it would not hire anyone affiliated with a labor union); *Capital Cleaning Contractors*, 322 NLRB 801, 807 (1996) (telling employees that it did not wish to hire union

employees).

II. THE ALLEGED REFUSALS TO HIRE THE FORMER EMPLOYEES AND THE ALLEGED REFUSAL TO BARGAIN WITH THE UNION

A. Applicable Legal Principals

A new owner of a business or a successor contractor such as the Respondent, is not obligated to hire all or even any of the employees employed by the predecessor contractor. However, it may not refuse to hire the predecessor's employees because they were represented by a union or to avoid having to recognize or bargain with the union. *NLRB v. Burns Security Services,* 406 U.S. 272 (1972); *Howard Johnson's v. Detroit Local Joint Executive Board,* 417 U.S. 249 (1974).

In *Planned Building Services*, 347 NLRB 670, 673–674 (2006), the Board defined the elements necessary to prove that a successor Respondent unlawfully refused to hire the predecessor's employees. The Board stated that "where a refusal to hire is alleged in a successorship context, the General Counsel has the burden to prove that the Respondent failed to hire employees of its predecessor and was motivated by antiunion animus" citing *Wright Line,* 251 NLRB 1083 (1980). The factors which would establish that the new owner violated Section 8(a)(3) of the Act by refusing to hire the employees of the predecessor are:

> [S]ubstantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine. *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989).

The Board further noted that "once the General Counsel has shown that the Respondent failed to hire employees of its predecessor and was motivated by antiunion animus, the burden shifts to the Respondent to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive." *Planned Building Services*, 347 NLRB at 674.

B. The General Counsel's Prima Facie Case

1. Knowledge of the union status of the employees

The Respondent clearly had knowledge that the Union represented the cleaning employees at each of the three locations at issue. First, Quinn conceded that he became aware of the Union's representational status after he submitted a bid but before the Respondent began its work at the buildings. The Respondent cannot successfully argue that all of its hiring was completed before it became aware that the former employees were represented by the Union. It is clear that hiring was ongoing even after it began work at the buildings. In addition, Quinn received written communications from the Union that it represented the employees who worked at the three buildings, and was informed that its letter constituted applications for employment. Further, the Union requested that formal applications be supplied to the incumbent workers.

2. Antiunion animus

As set forth above, based on the credited testimony of day porter Bautista, I have found that Manager Castro told her that she would not be hired because she was "with the Union." I have also found that manager Perilla told de la Torre that the new owner "does not want the Union." These statements to potential employees, made by managers who are in a position to hire, constitute unlawful implied threats that employees would not be hired because of their union affiliation.

The Respondent argues that the lack of any evidence of union animus toward employees at 120 Mountainview Boulevard shows that, at least, its refusal to hire the incumbent employees at that location was lawful, and, at most, that no union animus has been established at all.

I disagree. The facts, taken as a whole, compel a finding that the Respondent possessed animus toward the Union and for that reason refused to hire the incumbent employees at all three locations. In addition, Castro, who I find told Bautista that she would not be hired because she was "with the Union," was in charge of hiring for 120 Mountainview Boulevard. The question to be decided is the Respondent's motive for not hiring the former cleaners, not the place at which that motive was expressed. Accordingly, the Respondent's motive was borne out in its refusal to hire the incumbent employees at 120 Mountainview Boulevard, notwithstanding that no unlawful comments were made there.

The Respondent next argues that the General Counsel has not met his burden of proving that "substantial animus" exists. I disagree. The comments of the Respondent's managers, both having the authority to hire, when interviewing candidates told them that the Respondent did not want people in the Union and was not hiring employees because they are with the Union. Those statements are all strong evidence of antiunion motivation. Such comments clearly are coercive because they made it clear to the applicants that they would not be hired because of their union affiliation. In addition, I have credited de la Torre's testimony that Perilla told her that the owner does not want the Union.

In *Galion Pointe, LLC*, 359 NLRB No. 88, slip op. at 18 (2013), affd. 361 NLRB No. 135 (2014), the Board found that substantial animus existed in the respondent's telling applicants, before the new owner competed its hiring, that the union would not be representing them once the new owner took over. Here, the Respondent similarly informed prospective employees that they would not be hired because of their union affiliation and that the Respondent did not want the Union and would not hire employees who were represented by it.

3. Lack of a convincing rationale for refusal to hire the predecessors' employees

The Respondent has a policy of not hiring the employees of a predecessor cleaning company unless asked to do so by their former Respondent.

President and owner Quinn established the policy when he opened the company 12 years ago and has implemented it during its existence. Quinn stated that the Respondent staffs the buildings pursuant to its internal reference system whereby the operations managers utilize their own contacts in the communi-

ty to find workers.

The evidence establishes that the Respondent hires many of its employees immediately before it begins work at a particular building, or on the day it begins such work. The evidence also establishes that Rodriguez and Henriquez, Juan Carlos Sossa, and employee Ruben and supervisor Ruben Galvez, were hired sight unseen based on the recommendations of brand new employee Puerta-Gil, and were not interviewed before they began work. Such a practice is contrary to manager Perilla's testimony that he "would not take the word of somebody [he] had just met" about a new employee, and that he must know the person who makes the recommendation. In this case he had just met Puerta-Gil, and had only known him for one or two days when those other workers began their employment.

As set forth above, consultant Edelstein, testified as to why a new cleaning contractor would want to hire the incumbent employees. Such reasons include (a) the benefit of having an experienced work crew familiar with the building and its tenants already at the site ready to begin work immediately (b) the belief that a crew of long tenure is honest and trustworthy (c) the benefit of having a system in place to transport the workers to the building, and (d) the benefit of not having the additional expense of training and doing background checks for new employees.

In contrast to these advantages which have been recognized in Board successor cleaning contractor cases similar to the instant case,[12] the Respondent has not articulated any reason, much less a "convincing rationale," for its use of an internal referral system or its refusal to hire the incumbent employees. The Respondent simply states that the internal reference system is its policy. The Respondent does not claim that the employees it obtains through that system are more able workers than the incumbents are or even that it has confidence in their ability to perform their work.

300 Lighting Way

As to 300 Lighting Way, the Respondent was asked by the building owner to offer jobs to the incumbent employees. It is clear that the Respondent's method of honoring the predecessor owner's request that it offer jobs to the incumbent employees was designed to give the appearance of doing so but, in actuality, evading that request.

According to the employees, whose testimony I credit, they accepted Perilla's offer of jobs at the lower wage rate and no benefits. Whether the workers said they would accept the "applications" or accept the "jobs" is not material. The important facts are that they expressed their agreement to Perilla's offer, were given applications at that time, and were told by him to return them to the Respondent's office.

It may be true, as they testified and as Perilla confirmed, that the employees expressed an interest in speaking to the Union or their former employer before accepting the jobs, but nevertheless they later completed the applications and submitted them.

I further find that Perilla agreed to pick up the applications at their homes that weekend but did not. I cannot credit Perilla's testimony that the workers did not accept the offer of jobs but that he gave them applications anyway. It would make no sense for the employees to reject the offer but then ask for applications, fill them out, and return them to the Respondent's office at Perilla's request, which they did. If they rejected the jobs, as Perilla stated, he would not have asked them to file the applications at his office. Accordingly, I find that the employees expressed a desire to continue working, even at the lower rates, because they needed the jobs. They requested applications, completed them, and brought them to the office, as Perilla requested.

I credit the employees' testimony that Perilla promised to pick up the applications at the workers' homes that weekend. They credibly testified that when he did not appear at their homes, they phoned him, and he did not answer those calls. Perilla conceded that he did not answer calls that weekend from phone numbers that he did not recognize. Such testimony supports a finding that he agreed to pick up the applications but did not.

The fact that the employees completed applications, sometimes twice, and either gave them to the Respondent's managers or delivered them to the Respondent's office, establishes that the incumbent workers sought to be employed by the Respondent which was aware of their interest. Indeed, Union Official Brown made a written request, which Quinn received, that applications be given to the former workers.

If the incumbent employees had no desire for the jobs because the pay was too low they would not have been so persistent in their efforts to ensure that their applications found their way to the Respondent's officials.

The way in which the notice to those workers was posted at 300 Lighting Way also lends support to a finding that the Respondent was "going through the motions" in offering jobs to the incumbent employees there. The "English only" notice in was in contrast to the Respondent's practice of writing notices to employees in Spanish and English. Although the Respondent's Spanish-speaking office worker was not available to translate the note, the two operations managers could have been asked to do so.

Significantly, the Respondent produced applications from two incumbent employees at 300 Lighting Way: Fanny Gramajo, dated August 15, 2014, and Teresa Hernandez, dated July 3, 2014. Each application identified the worker as having been employed by CRS at that building. The applications also stated that the two prospective employees were ready to work as soon as possible. They both listed their current wages as $12.80 per hour. Hernandez' application stated in the "salary desired" box as $13.30.

In sum, the Respondent was asked by the prior owner to offer jobs to the current workers. The Respondent offered them jobs which they accepted. The Respondent admits receiving at least two applications, from Gramajo and Hernandez. If the Respondent is to be believed that it intended to comply with the request to offer jobs to the former cleaners, it should have hired Hernandez, at least. As set forth above, Perilla received her application on July 8, and she was told at the Respondent's office on July 10 that Perilla had the application. Thus, the Respondent had the opportunity to honor its commitment to

[12] *Pressroom Cleaners*, 361 NLRB No. 57 (2014); *Laro Maintenance Corp.*, 312 NLRB 155, 161–162 (1993).

hire the incumbent workers but did not.

Instead, based on the recommendation of Puerta-Gil, a person the Respondent had just hired, the Respondent hired Juan Carlos Sossa's mother and sister, apparently without their having been interviewed or having filed applications.

The Respondent sought to give the impression that its referral system of hiring was efficient because its managers had numerous sources to obtain workers through their contacts in the community. It would seem that the Respondent would want to begin work on its first day with an adequate supply of employees. Indeed, it had at least one month's notice that it would be cleaning the buildings at issue.

Nevertheless, at 300 Lighting Way, the Respondent seemed to be completely unprepared to begin its contract. Puerta-Gil, a new employee, was asked to bring in workers on successive days at the start of the contract. The two people he brought had not been interviewed or seen by the Respondent's hiring managers before they began work.

4. Inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive

As set forth above, the statements made to Bautista and de la Torre constitute overt acts evidencing a discriminatory motive. Thus, both were told that they would not be hired because of their connection with the Union.

The Respondent was given about one month's notice that it would be the cleaning contractor at One Meadowlands Plaza. The 1-month period of time should have been sufficient to assemble its work force so that it would be able to begin work on the start date with a full crew. Indeed, the managers testified that they had a ready supply of sources, from friends and relatives, who knew of candidates who were available to work.

Thus, hiring should have been easily and quickly accomplished given the Respondent's reliance on its internal referral system pursuant to which its managers have contacts with people in their communities who are willing and available to work. Indeed, Perilla stated that he located 15 to 20 employees for One Meadowlands Plaza. I cannot credit that testimony since, on June 27, the first day of work at that building, there appeared to be a shortage of cleaners.

For example, Puerta-Gil stated that on June 26 he was asked to bring his two friends, only one of whom had completed an application before beginning work. Further, he and the others worked a longer shift that night because they were short of help. In addition, Castro asked Puerta-Gil to bring additional workers, and he brought two new employees the following day. Accordingly, I find that Pettinger's advice to Union Official Garate on June 27 at One Meadowlands Plaza that he "had workers" and did not need the former cleaners, was a deliberate misstatement.

The above clearly shows that the Respondent's internal hiring system failed to produce the number of workers needed to properly staff the buildings. I accordingly find that the Respondent's method of staffing the buildings did not operate in the manner the Respondent sought to portray. Its hiring was haphazard and unsystematic. It engaged in a "frenzied hiring effort to recruit, screen and train a new workforce" when it began its contracts, while it had available an experienced, trained work force comprised of the incumbent employees. *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 30.

Thus, the Respondent's internal reference system failed to produce the necessary number of workers it needed on the first day of work. I conclude from this, and the facts of this case, that the Respondent's motive in not hiring the incumbent workers was that they were represented by the Union.

The Respondent rehired Puerto-Gil who it had discharged. Although he threatened to sue the Respondent if he was not rehired, he was nevertheless accepted for employment. This took place when experienced, incumbent workers were available to work at the Respondent's locations. The hire, or re-hire, of employees with poor disciplinary records when experienced incumbent employees were available is evidence of a discriminatory motive. *Planned Building Services*, 347 NLRB at 708; *Laro Maintenance Corp.*, 312 NLRB 155, 162 (1993). The Respondent's policy precluded it even from learning about the work performance of the former employees.

The Respondent's inconsistent hiring policy is established by Quinn's testimony. The Respondent's stated policy is to hire by "internal references"—employ only those who its managers obtain through personal reference.

However, Quinn stated that the Respondent accepts applications from "walk-ins" to its office because it "does not turn anyone away." But the evidence establishes that applicants who wore shirts bearing the Union's name were turned away.[13] Quinn stated that the Respondent could hire someone who filed a walk-in application without violating its internal reference system. He did not explain how this was possible if its policy is to hire exclusively based on that system.

If the Respondent's policy operates as portrayed, the Respondent could legitimately tell walk-in applicants that it does not accept applications since it hires exclusively through its internal reference system. However, here it inconsistently (a) provided applications, (b) refused to provide applications, and (c) accepted completed applications and asked for the applicants' drivers' licenses and social security cards. In none of those instances where it spoke to applicants at its office did the Respondents' agents advise the prospective employees that it hires exclusively through its internal reference system.

Both methods of obtaining workers are mutually exclusive. If the Respondent's policy is to solely acquire workers from its internal reference system, except when asked by the owner to retain the incumbents, it could not hire walk-in applicants. As further evidence of this inconsistency, if it could hire walk-in applicants, why did it not offer jobs to those experienced incumbent employees who filed such applications? Moreover, why would the Respondent retain such applications for 5 years if it did not intend to utilize them at some point.

I find that the evidence establishes that these inconsistent hiring practices support a finding that the Respondent conducted its hiring of staff for the three buildings in a discriminatory manner.

---

[13] Alvarado, Bautista, and Martinez, while wearing union shirts, were denied entry to the office and were told that the Respondent was not giving applications. Upon their return 3 weeks later, they were given applications.

5. Evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessors' employees from being hired as a majority of the new owner's overall work force in order to avoid the Board's sucessorship doctrine

The evidence clearly establishes that the Respondent's conduct operated in a way as to preclude the predecessors' employees from being hired as a majority of its work force in order to avoid becoming a successor Respondent.

The Respondent's policy of not hiring the employees of any of its predecessors effectively precluded it from hiring a majority of those workers, thereby automatically ensuring that it would not become a successor to the prior company and would therefore not be obligated to bargain with the union that represented the former workers. *Planned Building Services*, 347 NLRB above, at 708.

The Respondent has an exception to its policy where the prior company requests it to offer employment to the incumbent workers. Here, however, even when requested to offer employment to the current employees at 300 Lighting Way, the Respondent at first appeared to be sincere in that effort by offering employment to them, but then thwarted their good-faith attempt to have their applications received and considered.

Thus, the prior owner asked Quinn to post a notice offering jobs to the incumbent workers. The workers denied seeing the notice, but assuming that Quinn posted it, it was in English, contrary to other notices posted by the Respondent which were in Spanish and English. Notwithstanding that Quinn could have asked one of his Spanish-speaking managers to write a translation in Spanish, he did not. Further, Perilla offered jobs to the workers and distributed applications but then failed to pick them up as he had promised. When he finally accepted the applications no action was taken on them. Perilla's failure to fulfill his promise frustrated the employees' efforts to have their applications received, considered, and acted on favorably.

In addition, the Respondent did not reply to any of the communications it received from the Union. It had no obligation to do so. However, if, indeed, its internal referral policy was a plan legitimately created and lawfully implemented without any anti-union design, it could have advised the Union that its policy from the outset was a valid, nondiscriminatory method of hiring pursuant to which it has not and could not hire incumbent employees. However, by not replying to the Union's request that it supply applications to the incumbent employees and offer them positions, the Respondent created the impression that its policy was not bona fide, thereby undermining confidence that its policy was legitimately applied.

By not revealing its policy to the Union, the Respondent led the Union to believe that the incumbent employees could compete on an equal basis with others seeking positions. However, the displaced employees could not compete on a level playing field with nonincumbents because the Respondent's alleged policy precluded them from being considered for employment or hired.

Conclusion

The Respondent's decision to "ignore the obvious choice" of hiring an experienced and available work force supports a reasonable inference that its decision was motivated by animus towards the Union. *New Concept Solutions*, 349 NLRB 1136, 1154 (2007); *Laro Maintenance*, above, at 162. In making that inference, which is clearly warranted, I conclude that the real reason for the Respondent's failure to hire the experienced incumbent employees was because of their union membership and support, and the Respondent's desire to avoid having an obligation to bargain with the Union.

I conclude, based on all of the above, that the General Counsel has proven that the Respondent's decision not to hire the incumbent employees of the three buildings whose cleaning services it undertook was motivated by antiunion animus. The burden then shifts to the Respondent to establish by a preponderance of the evidence that it would have taken the same action, absent the employees' union activities and support. *Planned Building Services* and *Wright Line*, above.

The Respondent argues that even if the General Counsel proved that its refusals to hire the incumbent employees were motivated by union animus, it has shown that it would not have hired those employees even in the absence of their union membership. It reasons that since it followed its consistent, longtime practice of not hiring incumbent employees unless instructed to do so, it has shown that it would not have hired the incumbent employees regardless of their union membership.

The Respondent has not met its burden of proof. It has not proven that it would have refused to hire the incumbent employees in the three buildings even in the absence of their union affiliation. In order to satisfy its burden of proof the Respondent must show that its internal reference system was validly applied, and that it was implemented in a manner which could be expected to lead, or did indeed lead, to a businesslike, efficient method of staffing the buildings.

In contrast, the evidence shows that the Respondent made last-minute hires of people it did not know or those who were recommended by employees who themselves who had just been hired. This contradicted manager Perilla's testimony that when hiring an employee he would not take the word of someone he did not know or had just met. In some cases the Respondent did not interview the people it hired notwithstanding owner Quinn's testimony that interviews always take place. Further, the Respondent hired someone who had been discharged from one of its buildings.

The Respondent relies heavily on *GFS Building Maintenance, Inc.*, 330 NLRB 747 (2000). In that case, the Respondent, a New Hampshire cleaning company, was hired to clean two buildings in Hartford, Connecticut. It had a long-standing policy of not hiring its predecessor Respondent's employees, instead hiring through an internal reference system for the buildings it cleaned in New Hampshire. However, the building owner required GFS to hire Hartford residents. The Respondent refused to hire the predecessor's employees and instead, placed advertisements in local Hartford newspapers seeking employees. It could not use its internal referral system because it did not know any Hartford residents.

The Board found that GFS possessed substantial animus toward the union and that it was a successor to the previous contractor. However, the Board found no violation in the respondent's refusal to hire the incumbent employees. It held that the

respondent had proven that it would not have hired them even in the absence of their union affiliation. The Board reasoned that it followed its "long-standing policy [of not hiring the predecessor's employees] which did not originate from animus." 330 NLRB at 753.

The Board further found that the Respondent's policy was not implemented by it to avoid the union, although it had that effect in Hartford. The Board concluded that the Respondent's "hiring practices in Hartford are not inconsistent with its past practice which has existed in a union free environment." Thus, there being no unions in that area of the country, GFS adopted and implemented its policy without regard to union organization, or as a strategy to avoid hiring union members. 330 NLRB at 754.

GFS is distinguishable from, and does not control, this case. First, GFS had no cleaning contracts in cities where the cleaning contractors were unionized. In contrast, here, the Respondent operates in cities, including those in New Jersey, where such contractors have contracts with the Union. Indeed, the three buildings taken over by the Respondent here were all under contract with the Union. Accordingly, it may not be said that the Respondent has operated in a "union free environment."

I reject the Respondent's argument that it operates in "its own union free environment" because it has not chosen to recognize the unions in the buildings that it cleans. As I find herein, it has done so in this case because of antiunion motivation in an attempt to avoid hiring a majority of employees and thereby assume a successor Respondent's obligation to recognize and bargain with the Union.

Further, GFS hired the incumbent employees when it was required as a condition of its obtaining a contract. Here, the Respondent was not required to hire the incumbent employees at 300 Lighting Way but was asked to offer employment to them. As I have set forth above, its alleged offers of employment to the displaced employees put obstacles in their path, and prevented them from being hired. They were admittedly asked to deliver their applications to the office, but then, when they did, none were interviewed or hired.

GFS had a rational explanation for its refusal to hire incumbent employees. It believed that it was unethical to do so because that practice would constitute stealing employees from their former Respondent. It never laid-off employees in its 30-year history, instead transferring its employees from a cancelled account, and its hiring system produced a 2-percent turnover rate. The Respondent, in contrast, offered neither an explanation for the establishment or implementation of its internal referral policy nor its refusal to hire incumbent employees, and it had a high turnover rate.

I accordingly find and conclude, as set forth above, that the Respondent has not met its burden of establishing that it would not have hired the incumbent employees even absent their union membership and support. I therefore find that it has, by refusing to hire the incumbent employees at the three buildings at issue, violated Section 8(a)(1) and (3) of the Act.

C. The Refusal to Recognize and Bargain with the Union

The complaint alleges that the Respondent would be the legal successor to CRS and Collins but for its unlawful refusal to hire the employees of those two former Respondents. The Respondent does not deny that it refused to recognize and bargain with the Union but argues that no obligation existed because it is not the legal successor to those two companies cleaning operations at the three buildings at issue.

The test for determining successorship under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), is well established:

> A Respondent, generally, succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a "substantial and representative complement," in an appropriate bargaining unit are former employees of the predecessor and if the similarities between the two operations manifest a "substantial continuity" between the enterprises. *Fall River Dyeing and Finishing Corp.*, 482 U.S. 27, 41–43 (1987).
>
> The Board will normally assess whether a Respondent is a successor as of the time a union makes its demand for recognition and bargaining, provided the Respondent has already hired a substantial and representative complement of employees. See *MSK Corp.*, 341 NLRB 43, 44–45 (2004).

The bargaining unit in the successor's operation must be appropriate. The complaint sets forth as the appropriate bargaining unit, the unit which existed in the Union's contracts with the predecessor Respondents. That unit in each of the buildings is "all full-time, regular part time building service employees at the respective building, excluding guards and supervisors as defined in the Act."

The evidence establishes that the employees of the two predecessor Respondents, CRS and Collins, who cleaned the offices at the three buildings at issue, have been represented by the Union. When the Respondent began cleaning those buildings, it employed its own workers to perform the same unit work. *Planned Building Services*, above at 717–718 (single location for each building, where employees performed unit work, were found to be appropriate units).

I accordingly find, based on the above, that a unit consisting of building service employees who clean and maintain the building at each of the three locations serviced by the Respondent which are at issue here, is an appropriate unit. The critical inquiry in such an analysis is whether the new Respondent conducts essentially the same business as the predecessor, in other words, whether the similarities between the two operations manifest a substantial continuity between the enterprises. *Hydrolines Inc.*, 305 NLRB 416, 421 (1991), citing *Fall River Dyeing*, above 482 U.S. at 41–43 and *Burns Security Services*, above 406 U.S. at 280, fn. 4.

The factors include whether the business is essentially the same, whether the employees of the new company are doing the same jobs under the same supervisors, and whether the new entity has the same production process, produces the same products and has the same body of customers. These factors are assessed primarily from the perspective of the employees, that is whether those employees, who have been retained (or, as here, should have been retained) will view their job situation was essentially unaltered. *Hydrolines*, above, at 421.

Here, the Respondent is engaged in essentially the same

business as CRS and Collins. It cleans the same commercial buildings at the same location. The former employees of CRS and Collins who worked at those buildings would have constituted the majority of the Respondent's unit employees absent its discriminatory refusals to hire them.

Where, as here, a Respondent has unlawfully refused to hire its predecessors' employees, the Board infers that these employees would have been retained, absent the discrimination against them. *Pressroom Cleaners*, above at 32; *Mammoth Coal*, 354 NLRB 687 728 (2009); *Planned Building Services*, above at 674; *New Concept Solutions*, above, at 1157.

As set forth above, I have found that the Respondent discriminatorily refused to hire the employees formerly employed by CRS and Collins at the three buildings cleaned by them, and that it staffed its operations with other employees when it commenced operations at those facilities on May 15, June 27, and July 8, 2014, respectively.

Had the Respondent hired the incumbent employees they would have constituted a majority of the Respondent's work force, and it is presumed that those employees would have continued to support the Union and would have continued to work for the Respondent but for the discrimination, the failure to hire, against them.

The Union made a demand for bargaining in the communications it sent to Quinn on July 16, in which it asked the Respondent to hire the former employees, recognize and bargain with the union, and restore to the employees their former terms and conditions of employment. In any event, the Board has held that no bargaining demand was necessary because a respondent's unlawful refusal to hire the predecessor's employees renders any request for bargaining futile. *Mammoth Coal*, above at 729; *Planned Building Services*, above, at 718; *Smith & Johnson Construction Co.*, 324 NLRB 970 (1997); *Triple A Services*, 321 NLRB 873, 877 fn. 7 (1996).

I accordingly find and conclude that the Respondent is the legal successor to CRS and Collins at the three buildings at issue. *Pressroom Cleaners*, above at 32; *Mammoth Coal*, above at 689; *Planned Building Services*, above at 674; *New Concept Solutions*, 349 NLRB at 1157; *Love's Barbeque Restaurant*, 245 NLRB 78, 82 (1979).

Based upon the foregoing, I find and conclude that Respondent has violated Sections 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

Accordingly, the Respondent, as a statutory successor, was obligated to recognize and bargain with the Union. See *NLRB v. Burns Security Services*, 406 U.S. 272, 280–281 (1972); *Pressroom Cleaners*, above, at 34; *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979).

D. The Unilateral Changes

It is well settled that a statutory successor is not bound by the substantive terms of the predecessors' collective-bargaining agreement and is ordinarily free to set initial terms and conditions of employment. *Burns*, 472 U.S. at 284.

But that right is forfeited where, as here, the successor unlawfully refuses to hire the predecessors' employees. But for the discriminatory refusal to hire its predecessors' employees, the Respondent would have employed them in positions in the three bargaining units. Thus, the Respondent did not have the right to unilaterally set the initial terms and conditions of employment. In such cases, the successor must, as a matter of law, maintain the status quo by continuing the predecessors' terms and conditions of employment until the parties have bargained to agreement or impasse. *Planned Building Services*, 347 NLRB 670, 674 (2006).

The Respondent implemented its own terms and conditions for its employees in the three buildings it cleaned. Its employees' wage rates ranged from $8.50 to $12 per hour. No benefits were provided.

The Respondent's contracts began on May 15, June 27, and July 8, 2014. The Union's contracts with the predecessor Respondents provided for a wage rate of $12.35 per hour effective July 2013, and $12.80 per hour effective July 1, 2014. The contracts also provided for benefits such as vacations, sick days, bereavement pay, health insurance, pension, and holidays.

I accordingly find that the Respondent has further violated Section 8(a)(5) and (1) of the Act by unilaterally imposing new terms and conditions of employment for its unit employees and not maintaining the predecessors' terms and conditions of employment until the parties have bargaining to agreement or impasse. *Planned Building Services*, above, at 674.

CONCLUSIONS OF LAW

1. The Respondent, Eastern Essentials Services, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Service Employees International Union, Local 32BJ, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union has been and is the exclusive collective-bargaining representative of the Respondent's employees in the following appropriate units:

> All full-time, regular part time building service employees at the building located at 120 Mountainview Boulevard, Bernard Township, New Jersey excluding guards and supervisors as defined in the Act.
>
> All full-time, regular part time building service employees at the building located at One Meadowlands Plaza, East Rutherford, New Jersey excluding guards and supervisors as defined in the Act.
>
> All full-time, regular part time building service employees at the building located at and 300 Lighting Way, Secaucus, New Jersey, excluding guards and supervisors as defined in the Act.

4. The Respondent has violated Section 8(a)(1) of the Act by informing employees that it was not hiring employees because they are with the Union.

5. The Respondent has violated Section 8(a)(1) and (3) of the Act by refusing to hire the following former employees of CRS Facility Services, and Collins Building Services for positions in the above bargaining units:

120 Mountainview Boulevard, Bernard Township, NJ

Amanda Barrientos	Yvon Feo Hernandez
Monepeque Castillo	Leonardo Menijivar

Diana Cruz	Hector Mora
Reyna Hernandez	

One Meadowlands Plaza, East Rutherford, NJ

Luis Airos	Ebelia Martinez
Maritza Alvarado	Maria Martinez
Wander Arias	Julio Mercedes
Beatriz Bautista	Sara Perez
Zuniba Carlos	Iadira Persaud
Marina Castellanos	Margarita Reberon
Rafael Cuevass	Hilda Tobar
Luisa Flores	Maria Valencia
Rafaela Herrera	Maida Veras

300 Lighting Way, Secaucus, NJ

Inez Fandino	Luz Perez Orozco
Fanny Gramajo	Eteolo Sanchez
Teresa Hernandez	Maria de la Torre
Eleodoro Luciano	Maria Victoria

6. The Respondent has violated Section 8(a)(5) and (1) of the Act since May 15, 2014, in the 120 Mountainview Boulevard unit, and since June 27, 2014, in the One Meadowlands Plaza unit, and since July 9, 2014, in 300 Lighting Way unit, by refusing to recognize and bargain with the Union and by unilaterally changing the terms and conditions of employment of its employees in those units without prior notification and bargaining with the Union.

7. The Respondent did not impliedly threaten its predecessors' employees that it would not operate as a union facility as alleged in the amended complaint. That allegation of the complaint is dismissed.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent unlawfully refused to hire the individuals named above, I shall recommend that the Respondent offer to these employees positions for which they would have been hired, absent the Respondent's unlawful discrimination, or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges enjoyed, discharging if necessary any employees hired in their place. The employees listed above shall be made whole for any loss of earnings they may have suffered due to the discrimination practiced against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall also be required to expunge from its files any reference to the unlawful refusal to hire and to notify the discriminatees in writing that this has been done.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters for each employee.

Further, having found that the Respondent unlawfully refused to bargain collectively with the Union, I shall recommend that the Respondent, on request, recognize and bargain with the Union concerning wages, hours, benefits, and other terms and conditions of employment, and if an agreement is reached reduce the agreement to a signed written contract. Additionally, the Respondent shall on request of the Union, rescind any departures from terms of employment that existed before the Respondent's commencement of its cleaning services at 120 Mountainview Boulevard, Bernard Township, New Jersey, One Meadowlands Plaza, East Rutherford, New Jersey, and 300 Lighting Way, Secaucus, New Jersey, and retroactively restore preexisting terms and conditions of employment, including wage rates and contributions to benefit funds, that would have been paid, absent the Respondent's unlawful conduct, until the Respondent negotiates in good faith with the Union to agreement or to impasse. *New Concepts Solutions LLC*, 349 NLRB 1136, 1161 (2007). Backpay shall be computed as in *Ogle Protection Service*, 183 NLRB 602 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above. The Respondent shall also remit all payments it owes to employee benefit funds in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and reimburse its employees for any expenses resulting from the Respondent's failure to make such payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14].

ORDER

The Respondent, Eastern Essential Services, Inc., Fairfield, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing applicants for employment that it is not hiring employees because they are with the Union.

(b) Refusing to hire the former employees of CRS Facility Services and Collins Building Services because they were members of and supported Service Employees International Union, Local 32BJ.

(c) Refusing to recognize and bargain in good faith with Service Employees International Union, Local 32BJ as the exclusive collective-bargaining representative of its employees in the

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

following appropriate bargaining units:

> All full-time, regular part time building service employees at the building located at 120 Mountainview Boulevard, Bernard Township, New Jersey, excluding guards and supervisors as defined in the Act.
>
> All full-time, regular part time building service employees at the building located at One Meadowlands Plaza, East Rutherford, New Jersey, excluding guards and supervisors as defined in the Act.
>
> All full-time, regular part time building service employees at the building located at and 300 Lighting Way, Secaucus, New Jersey, excluding guards and supervisors as defined in the Act.

(d) Refusing to recognize and bargain with Service Employees International Union, Local 32BJ, by unilaterally changing the terms and conditions of employment of its employees in the above appropriate bargaining units without prior notification to and bargaining with the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Union in writing that it recognizes the Union as the exclusive representative of its unit employees under Section 9(a) of the Act and that it will bargain with the Union concerning terms and conditions of employment for employees in the above-described appropriate bargaining units.

(b) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate bargaining units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) On request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to the Respondent's takeover of the operations of predecessor CRS Facility Services and Collins Building Services at the three locations set forth above, retroactively restoring preexisting terms and conditions of employment, including wage rates and welfare and pension contributions, and other benefits, until it negotiates in good faith with the Union to agreement or to impasse.

(d) Make whole, in the manner set forth in the remedy section of this decision, the unit employees for losses caused by the Respondent's failure to apply the terms and conditions of employment that existed immediately prior to its takeover of the operations of predecessors CRS Facility Services and Collins Building Services at the three locations set forth above.

(e) Within 14 days of the date of this Order, offer employment to the following former unit employees of CRS Facility Services and Collins Building Services, who would have been employed by Respondent but for the unlawful discrimination against them, in their former positions or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their place:

120 Mountainview Boulevard, Bernard Township, NJ

Amanda Barrientos	Yvon Feo Hernandez
Monepeque Castillo	Leonardo Menijivar
Diana Cruz	Hector Mora
Reyna Hernandez	

One Meadowlands Plaza, East Rutherford, NJ

Luis Airos	Ebelia Martinez
Maritza Alvarado	Maria Martinez
Wander Arias	Julio Mercedes
Beatriz Bautista	Sara Perez
Zuniba Carlos	Iadira Persaud
Marina Castellanos	Margarita Reberon
Rafael Cuevass	Hilda Tobar
Luisa Flores	Maria Valencia
Rafaela Herrera	Maida Veras

300 Lighting Way, Secaucus, NJ

Inez Fandino	Luz Perez Orozco
Fanny Gramajo	Eteolo Sanchez
Teresa Hernandez	Maria de la Torre
Eleodoro Luciano	Maria Victoria

(f) Make the employees referred to in paragraph 2(e) whole for any loss of earnings and other benefits they may have suffered by reason of the Respondent's unlawful refusal to hire them, in the manner set forth in the remedy section of the decision.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire the employees named in the paragraph 2(e) and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(h) Within 14 days after service by the Region, post at its facility in Fairfield, New Jersey, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 2014.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 13, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT inform you or applicants for employment that we are not hiring employees because they are with the Union.

WE WILL NOT refuse to recognize and bargain in good faith with Service Employees International Union, Local 32BJ as your exclusive collective-bargaining representative in the following appropriate bargaining units:

All full-time, regular part time building service employees at the building located at 120 Mountainview Boulevard, Bernard Township, New Jersey, excluding guards and supervisors as defined in the Act.

All full-time, regular part time building service employees at the building located at One Meadowlands Plaza, East Rutherford, New Jersey, excluding guards and supervisors as defined in the Act.

All full-time, regular part time building service employees at the building located at and 300 Lighting Way, Secaucus, New Jersey, excluding guards and supervisors as defined in the Act, excluding guards and supervisors as defined in the Act.

WE WILL NOT refuse to recognize and bargain with Service Employees International Union, Local 32BJ by unilaterally changing your terms and conditions of employment in the above appropriate bargaining units without prior notification to and bargaining with the Union.

WE WILL NOT refuse to hire you because you are members of and supported Service Employees International Union, Local 32BJ.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify the Union in writing that we recognize the Union as the exclusive representative of our employees in the above units under Section 9(a) of the Act and that we will bargain with the Union concerning your terms and conditions of employment in the above-described appropriate bargaining units.

WE WILL recognize and, on request, bargain with the Union as your exclusive representative in the above-described appropriate bargaining units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL on request of the Union, rescind any departures from your terms and conditions of employment that existed immediately prior to the our takeover of the operations of predecessor CRS Facility Services and Collins Building Services at the three locations set forth above, retroactively restoring your preexisting terms and conditions of employment, including wage rates and welfare and pension contributions, and other benefits, until we negotiate in good faith with the Union to agreement or to impasse.

WE WILL make you whole, in the units set forth above, for losses caused by our failure to apply the terms and conditions of employment that existed immediately prior to our takeover of the operations of predecessor CRS Facility Services and Collins Building Services at the three locations set forth above.

WE WILL within 14 days of the date of this Order, offer employment to the following former unit employees of the CRS and Collins, who would have been employed by us but for our unlawful discrimination against them, in their former positions or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their place:

120 Mountainview Boulevard, Bernard Township, NJ

Amanda Barrientos	Yvon Feo Hernandez
Monepeque Castillo	Leonardo Menijivar
Diana Cruz	Hector Mora
Reyna Hernandez	

One Meadowlands Plaza, East Rutherford, NJ

Luis Airos	Ebelia Martinez
Maritza Alvarado	Maria Martinez
Wander Arias	Julio Mercedes
Beatriz Bautista	Sara Perez
Zuniba Carlos	Iadira Persaud
Marina Castellanos	Margarita Reberon
Rafael Cuevass	Hilda Tobar
Luisa Flores	Maria Valencia
Rafaela Herrera	Maida Veras

300 Lighting Way, Secaucus, NJ

Inez Fandino	Luz Perez Orozco
Fanny Gramajo	Eteolo Sanchez
Teresa Hernandez	Maria de la Torre
Eleodoro Luciano	Maria Victoria

WE WILL make you whole, with interest, for any loss of earnings and other benefits you may have suffered by reason of our unlawful refusal to hire you.

WE WILL within 14 days from the date of this Order, remove from our files any reference to our unlawful refusal to hire you, and, within 3 days thereafter, notify you in writing that this has been done and that the refusal to hire you will not be used against you in any way.

EASTERN ESSENTIAL SERVICES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22–CA–133001 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.